

Blackmore v Fossner Timepieces Clock Shop, Inc.

2022 NY Slip Op 31021(U)

March 29, 2022

Supreme Court, New York County

Docket Number: Index No. 159279/2021

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART 12

Justice

-----X

JACKIE BLACKMORE,

Plaintiff,

- v -

INDEX NO. 159279/2021

MOTION DATE

MOTION SEQ. NO. 001

FOSSNER TIMEPIECES CLOCK SHOP, INC.,
J & P TIMEPIECES, INC., PETER FOSSNER, JEFF MORRIS,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8-10, 12-14 were read on this motion to DISMISS.

By notice of motion, defendants move pursuant to CPLR 3211(a)(1), (2), (5) and/or (7) for an order dismissing plaintiff's claims for intentional infliction of emotional distress, negligent infliction of emotional distress, negligent hiring or supervision, and negligence. Plaintiff opposes.

I. COMPLAINT (NYSCEF 1)

As pertinent here, plaintiff alleges that she was employed by defendant J&P Timepieces, a Manhattan shop owned and operated by defendants Fossner and Morris.

Plaintiff alleges that she was fired after complaining about Fossner smoking cigars inside J&P's workplace, and that his secondhand smoke caused her and her coworker to develop physical ailments, for which she sought medical treatment. Plaintiff also contends that defendants created a hostile work environment which was permeated by Fossner's repeated sexist and racist comments.

Plaintiff began working for defendants in June 2020, and she claims that in August 2020, while Fossner was at his desk, holding a cigar in his hand and preparing to light it, she asked him not to smoke inside. He responded by yelling at her that he was aware that he was not supposed to do so, and walked over to her and shoved the cigar in her face, asking whether she could see if it was lit. Later that day, he screamed at her coworker.

A few days later, Fossner told her and the coworker that he would not stop smoking inside, that he was the boss, and that if they were uncomfortable about it, he could find replacements for them. The next day, Fossner continued smoking in the workspace and in September 2020, he began smoking in the bathroom.

On or about September 24, 2020, plaintiff told Fossner that his smoking was causing her and her coworker to suffer chest pain. Fossner told her that he would need to find someone else to work there. Plaintiff was terminated at the end of October 2020.

Plaintiff also details the following comments made by Fossner between July and August 2020:

- (1) while noting how tan his skin was, Fossner stated “Look, I’m Black Lives Matter”;
- (2) referring to the COVID-19 pandemic, he said that China and the United Arab Emirates “should be sent to Mars”;
- (3) while describing having undergone a recent neurological exam which tested his arm and hand motor function, Fossner pantomimed reaching out to pinch his wife’s nipples;
- (4) as jazz played in the store, Fossner stated that “jazz is for colored people”;
- (5) observing that toiler paper in the store was running low, Fossner stated that they should wipe with their hands instead;

- (6) after a phone call with his wife, Fossner called her a “fucking bitch” and “fucking whore”;
- (7) after another phone call with his wife, he said “screw my wife”;
- (8) Morris asked plaintiff to speak to her female co-worker “woman to woman” about her diet and skincare;
- (9) Morris used the term “mulatto” to describe the grandchildren of an associate;
- (10) Fossner stated that he wished his wife was dead and that she could drag herself around like a “miserable bitch” after she had injured her foot; and
- (11) Fossner screamed at his wife on the phone, calling her a “fucking bitch.”

Plaintiff thus advances causes of action for a violation of Labor Law § 740, based on defendants’ termination of her employment in retaliation for her complaint about Fossner’s smoking, a hostile work environment pursuant to the New York City Human Rights Law, intentional infliction of emotional distress based on Fossner’s conduct, negligent infliction of emotional distress, battery, negligent hiring or supervision, and negligence.

II. NEGLIGENCE

CPLR 3211(a)(1) provides for dismissal of a cause of action, where “the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002] [internal citation omitted]). And, pursuant to CPLR 3211(a)(2), a claim may be dismissed where the court lacks subject matter jurisdiction over it.

As it is undisputed that plaintiff’s claims arose during her employment with defendants and that they maintained workers’ compensation coverage for her, her negligence claims may not be asserted here, as workers’ compensation is her sole remedy for such claims. (*See Miller v Ntl.*

Prop. Mgt. Assocs., Inc., 191 AD3d 1341 [4th Dept 2021] [causes of action for negligent hiring, training, and supervision and negligent infliction of emotional distress barred by exclusivity provisions of workers' compensation law]; *Rodriguez v Dickard Widder Indus.*, 150 AD3d 1169 [2d Dept 2017] [plaintiff's claims for negligent hiring and retention and negligent infliction of emotional distress, arising from defendants' alleged sexual harassment and retaliation, dismissed as barred]; *Thomas v Northeast Theatre Corp.*, 51 AD3d 588 [1st Dept 2008] [dismissing negligent infliction of emotional distress claim]; *Martinz v Canteen Vending Svces. Roux Fine Dining Chartwheel*, 18 AD3d 274 [1st Dept 2005] [negligence claims arising out of supervisor's assault of plaintiff dismissed]).

III. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

“In assessing the adequacy of a complaint under CPLR 3211 (a) (7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff ‘the benefit of every possible favorable inference’” (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 334 [2013] [citation omitted]). “[I]f from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail.” (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 211 [1st Dept 2013] [citation omitted]).

A cause of action for intentional infliction of emotional distress requires proof of the following elements: (1) extreme and outrageous conduct, (2) intent to cause or disregard of a substantial probability of causing severe emotional distress, (3) a causal connection between the conduct and the injury, and (4) resulting severe emotional distress. (*Lau v S&M Enters.*, 72 AD3d 497, 498 [1st Dept 2010]).

The high standard that must be met to demonstrate extreme and outrageous conduct is conduct that is “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” (*Chanko v Am. Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016], quoting *Howell v New York Post Co.*, 81 NY2d 115, 122 [1993]). It is “designed to filter out petty complaints and assure that the emotional distress is genuine.” (*Chanko*, 27 NY3d at 57 [internal citations omitted]).

Even construing plaintiff’s allegations as true, Fossner’s conduct in continuing to smoke in the workplace despite her protests, and yelling at and terminating her for complaining about it does not constitute extreme and outrageous conduct, even though boorish, overbearing, and obnoxious. (*See eg, Drimer v Zionist Org. of Am.*, 194 AD3d 641 [1st Dept 2021] [allegations that defendants engaged in pattern of harassment and abusive conduct directed at plaintiff in context of his employment with them, which caused plaintiff to suffer anxiety and stress and led to cardiac event, insufficiently outrageous to state claim for intentional infliction]; *see also Loch Sheldrake Breach and Tennis Inc. v Akulich*, 141 AD3d 809 [3d Dept 2016], *lv dismissed* 28 NY3d 1104 [2016] [allegations that defendants engaged in intentional campaign to insult, demean, threaten and injure plaintiff, including screaming and yelling at her, not sufficiently outrageous and extreme conduct]).

Also insufficiently outrageous are Fossner and Morris’s racist and sexist comments and Fossner’s misogynistic references to his wife, especially as plaintiff does not allege that defendants referred to her or her coworker by any racist or sexist terms. (*See Clayton v Best Buy Co., Inc.*, 48 AD3d 277 [1st Dept 2008] [allegations that various employees made sexual and inappropriate remarks to plaintiff did not constitute conduct sufficiently outrageous]; *Herlihy v*

Metro. Museum of Art, 214 AD2d 250, 263 [1st Dept 1995] [while use of ethnic slurs “clearly reprehensible,” it did not sustain cause of action for intentional infliction of emotional distress, limited to “only the most egregious of acts”]).

While defendants’ comments were offensive and obnoxious, they do not rise to the level required to sustain the claim. (See eg, Suarez v Bakalchuk, 66 AD3d 419 [1st Dept 2009] [use of vulgar language on discharge form, while “extremely offensive and bizarre,” insufficient]; Stauber v New York City Tr. Auth., 10 AD3d 280 [1st Dept 2004] [allegations that defendant was rude to plaintiff and often used profanity did not constitute extreme and outrageous conduct]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants’ partial motion to dismiss is granted, and plaintiff’s claims for intentional and negligent infliction of emotional distress, negligent hiring or retention, and negligence are severed and dismissed; and it is further

ORDERED, that the parties submit a preliminary conference stipulation, by email to cpaszko@nycourts.gov, on or before May 4, 2022.

3/29/2022

DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: